United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

75-6054
75-6055

B

In The

United States Court of Appeals

For The Second Circuit

P/S

LUIS A. LEBRON, JR.,

Appellant,

vs.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

APPENDIX FOR APPELLANT

H. ELLIOT WALES
Attorney for Appellant
747 Third Avenue
New York, New York 10017
421-1993

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CIVIL DOCKET — DOCKET ENTRIES

UNITED STATES DISTRICT COURT

a JUDGE POLLACK

jury demand date:

74 CIV. 494 (494)

D. C. Form No. 106 Rev. Related Case: 74 Civ. 4943

TITLE OF CASE	ATTORNEYS
LUIS A. LEBRON, JR.	For plaintiff: H. Elliot Wales 747 Third Ave, N.Y.C. 10017 tele: 421-1993
VS.	
U.S. SECRETARY OF AIR FORCE	For defendant:

Filed Cause to Transfer from
U.S. District Court, Washington, D.C. 20001
Their No. 2223-73

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed X	Clerk				
J.S. 6 mailed ✓	Marshal	5/23/75	Wales Fees	5-	5-
Basis of Action: To Set Aside Judgment of Conviction & Sentence.	Docket fee				
	Witness fees				
Action arose at:	Depositions				

HS. LEBRON, JR. VS. UNITED STATES SECRETARY OF THE AIR FORCE, PENTAGON

Docket Entries

b

74 CV 40

	PROCEEDINGS	Date Order Judgment N
4	Filed certified copy of Order and docket entries transferring action from USDC District of Columbia, Washington, D.C. 20001 of Judge Hart dated 10/23/74.	
74	Mailed letter acknowledging receipt of same (their letter dated Nov. 4, 74)	
	PROCEEDINGS -USDC, SDNY $10.00	
74	Filed complaint and complete file.	
4	Filed notice of atty. appearance for pltff.	
74	Filed pltff.'s notice of motion for summary judgment ret: 1/24/75.	
74	Filed pltff.'s memo. of law in support of motion for summary judgment.	
	Filed Deft's affdvt & Notice of motion for judgment on pleadings.	
	Filed Deft's Memorandum of law in opposition to pltff's motion for summary judgment and in support of deft's cross motion for judgment on pleadings.	
5	Filed OPINION#42242. Complaint in case dismissed. Pltff's motions for summary judgment denied. Deft's cross-motions for judgment in his favor on pleadings granted. So Ordered. Pollack, J.	
5	Filed Pltff's Notice of appeal from judgment. Mailed notice to Paul J. Curran, U.S. Atty's Office, U.S. Courthouse, 1 St. Andrews Plaza, NY, NY10007)	
5	Filed true copy of USCA that appeal from judgment is dismissed. Clk(mn)	

CIVIL DOCKET

NITED STATES DISTRICT COURT

Docket Entries

c JUDGE POLLACK

Jury demand date:

74 CIV. 4943

orm No. 106 Rev. Related Case-74 Civ.4942

TITLE OF CASE	ATTORNEYS
LUIS A.LEBRON,JR. VS. U.S.SECRETARY of AIR FORCE	For plaintiff: H. Elliot Wales 747 Third Ave. New York,N.Y. 10017 tele: 421-1993. For defendant:

Transfer Cause -Transfer from USDC,District of Columbia ,Wash,D.C.20001-their No.C.A.2224-73-Hart,J.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
mailed X	Clerk				
mailed	Marshal				
of Action: Set aside Judg- of Conviction&Sentence.	Docket fee				
	Witness fees				
	Depositions				

LUIS A. LEBRON VS. U.S.SECRETARY OF THE AIR FORCE, PENTAGON

Docket Entries

d 74 Civ 4243

2nd Part

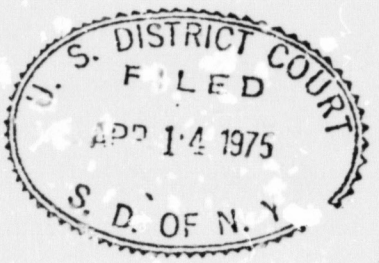
DATE	PROCEEDINGS	Date Order Judgment N
t.23-74	Filed certified copy of Order and Docket entries transferring action from USDC District of Columbia, Washington, D.C. 20001 of Judge Hart dated 10/23/74.	
v.12-74	Mailed letter acknowledging receipt of same(their letter dated Nov.4.74)&complete file.	
	PROCEEDINGS-USDC-SDNY $10.00	
v.11-74	Filed Complaint and complete file.	
ec.6/74	Filed notice of appearance of atty. for pltff.	
e 19-7	Filed affdvt. & notice of motion for summary judgment. Ret 1-17-74 at 2:15 P.M. (Pltff's)	
e 19-7	Filed pltff's memorandum of law in support for summary judgment.	
8-95-75	Filed Affdvt of Daniel J.Pykett for Deft. in response to certain questions posed by Court,etc.	
3-19-75	/Filed Suppl.Memorandum of Law.	
4-14-75	Filed Deft's Affdvt&Notice of motion for judgment on pleadings ret.1/24/75.	
4-14-75	Filed Pltff's Suppl.Memorandum of Law.	
4-14-75	~~Filed~~OPINION 42242. Complaints in this case dismissed.Pltff's motions for summary judgment denied,Deft's cross-motions for judgment in his favor on pleadings granted.So Ordered.Pollack,J. (docketed in this ne.(Also filed in 74 Civ.4942)	
4-14-75	Filed Pltff's Counsel affdvt	
-14-75	Filed Deft's Memorandum of Law in opposition to pltff's motion for summary ljudgment and in support of deft's cross motion to dismiss.	
.-06-75	Filed Pleff's Notice of Appeal from Judgment(mailed notice to Paul J.Curran,U.S. Atty's Office,U.S.Courthouse,1 St,Andrews Plaza,NY,NY10007)	
-02-75	Filed true copy of USCA that appeal from judgment dismissed.Clk.(mn)	

Mr. Pykett
74-3447

Copy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



LUIS A. LEBRON, JR.,

Plaintiff,

v.

THE UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

74 CIV. 4942 (MP)
74 CIV. 4943 (MP)

#42242

OPINION

APPEARANCES:

H. ELLIOT WALES, ESQ.
Attorney for Plaintiff
747 Third Avenue
New York, N.Y. 10017

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
By: Daniel J. Pykett, Esq.
Asst. United States Attorney

MILTON POLLACK, District Judge.

MILTON POLLACK, District Judge.

Cross-motions for judgment are before the Court. No factual issues are presented.

Plaintiff, an Air Force serviceman, seeks relief from two separate convictions by military courts martial. In one case, on January 12, 1971, he was found guilty of possession and use of a narcotic drug. In the other case, on December 17, 1971, he was found guilty of assault. Both complaints assert jurisdiction under 28 U.S.C. §§2251-54, the habeas corpus provisions, and 28 U.S.C. §1346, which authorizes suits against the United States in federal courts. Both suits were transferred to this District from the District of Columbia pursuant to 28 U.S.C. §1404(a) because the petitioner was found to be "in custody" in this District since he was paroled in the Bronx on probation. 1/

The authority of this Court to hear petitions for habeas corpus supports this proceeding in respect to the

1/ A petitioner who is released from jail on probation is still in custody for habeas corpus purposes. Jones v. Cunningham, 371 U.S. 236 (1963).

assault case since the complaint was filed while the plaintiff was either in prison or on probation. See 28 U.S.C. §2241(c). However, he was not in such "custody" when the complaint was filed pertaining to the narcotics case. Under certain circumstances where merits have been established, jurisdiction of the Courts to review a court martial decision has been found proper, even though habeas corpus jurisdiction would not lie because the plaintiff was not in custody. United States ex rel. Flemings v. Chafee, 458 F.2d 544 (2d Cir. 1972), rev'd on other grounds sub nom. Warner v. Flemings, 413 U.S. 665 (1973).[2/]

2/ See also Williams v. Froehlke, 356 F. Supp. 591 (S.D. N.Y. 1973), aff'd 490 F.2d 998 (2d Cir. 1974), which found jurisdiction to issue mandamus to overturn a court martial decision; Melvin v. Laird, 365 F. Supp. 511 (E.D.N.Y. 1973), which asserted jurisdiction to issue mandamus orders or declaratory relief under 28 U.S.C. §1346. Relief was ultimately denied on the merits in each case. Compare Secretary of the Navy v. Avrech, 42 U.S.L.W. 5233 (U.S. July 8, 1974), where the Supreme Court refused to decide "the difficult jurisdictional issue", of whether federal courts could review military courts in non-habeas actions, without the benefit of further argument, assumed jurisdiction, and dismissed the suit on the merits.

I. Narcotics Case

A court martial convicted plaintiff of violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934. He was sentenced to 6 months incarceration, forfeiture of part of his pay, and reduction in rank. Plaintiff contends that so far as concerns the narcotics case asserted against him the Article is unconstitutionally vague.

Article 134 authorizes court martial for "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to [the military code] may be guilty", which are not specifically mentioned in the Code of Military Justice.

In Parker v. Levy, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring), it is expressly stated that drug offenses are "of a sort which ordinary soldiers know, or should know, to be punishable" albeit not set out in the words in the statute.[3/] Parker holds that Article

3/ See Schlesinger v. Councilman, 43 U.S. L.W. 4432 (U.S. Mar. 25, 1975), where a petition for collateral relief from a court martial proceeding for possession of marijuana, to be prosecuted as a violation of Article 134, was held improperly granted. The Court noted at 4433 n.3 that petitioner there made no charge of vagueness or overbreadth.

134 is not so vague on its face as to allow it to be overturned at the instance of one whose offense was clearly within its reach.

Plaintiff further contends that the search warrant pursuant to which the contraband drugs were found in his possession was invalid, because it was issued on unsworn statements of a narcotics agent and because those statements were based on false statements of a fellow airman. Neither objection is meritorious. Authority to search may be granted upon oral and unsworn statements of a special agent under military law.[4/] As to the allegations that the agent's representations were predicated upon false statements of another airman, it need only be noted that a warrant is properly granted if it is found that "the affiant-agent has reasonable grounds for believing in the truth of" the allegedly false statement. United States v. Perry, 380 F.2d 356, 358 (2d Cir. 1967). Plaintiff does not allege that such reasonable grounds

4/ See, e.g. United States v. Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); United States v. McFarland, 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970).

did not exist, and it appears from the trial record that the trial court sufficiently dealt with the question of the validity of the search warrant.

There are no grounds established to sustain the relief plaintiff seeks in respect to the narcotics case. The military courts have dealt fully and fairly with the allegations raised by this petition and non-habeas relief is foreclosed. 10 U.S.C. §876; United States v. Carney, 406 F.2d 1328 (2d Cir. 1969).

II. Assault Case

Plaintiff seeks relief from a conviction of assault by an Air Force court martial under Military Law. Code of Military Justice, Art. 128, 10 U.S.C. §928. Subsequent to his conviction by the trial court and before its affirmance by the commanding officer of the post,[5/] plaintiff came forward with new evidence, a confession of a third party of commission of the crime for which plaintiff was convicted. Plaintiff's attorney informed the post's commanding

---

5/ As convening officer of the court martial, the commandant has the responsibility to review the trial court's decision and, if he agrees with it, to affirm the trial court's decision. 10 U.S.C. 864.

officer of the confession, and the latter ordered an ex parte investigation into plaintiff's allegations. After considering the record and the results of the investigation, the commanding officer approved the findings of the court martial.

Plaintiff then applied to the Judge Advocate General for a new trial, and he, pursuant to 10 U.S.C. §873, referred the application to the Air Force Court of Military Review, before which plaintiff's appeal was pending. Under Military Law, 10 U.S.C. §873, consideration of newly discovered evidence for purposes of deciding whether a new trial should be granted is given to the Judge Advocate General; if the party seeking a new trial has an appeal pending before either the Court of Military Review or the Court of Military Appeals, the motion for a new trial is referred for decision to the Court considering the appeal. Here the Air Force Court of Military Review, after considering the trial record and the ex parte investigative report prepared for the commandant, denied the motion for a new trial.

The plaintiff contends that due process was violated because the application for a new trial was not referred to the court martial trial judge for his consideration. Alternatively, it is contended that the statutes which fail to require the reference to the trial judge of a motion for a new trial are constitutionally deficient. Plaintiff's contentions on this point cannot be sustained.

Before considering whether the new trial motion was disposed of by procedures of the military which satisfy the requirements of the constitution, it is necessary to deal with a point which defendant raises. Defendant contends that there is no constitutional right to a new trial in the first place, so that any efforts by the Air Force to grant a new trial are gratuitous and thus not subject to challenge on constitutional grounds. Research has yielded very little law on this subject, though the legal encyclopedias support defendant's view that there is no constitutional right to a new trial. See, e.g., 16 Am. Jur. 2d Constitutional Law §583: "Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings."; accord, 58 Am. Jur. 2d New Trial §15. Whitley v. Superior Court,

113 P. 2d 449 (Sup. Ct. Cal. 1941), holds that there is no constitutional right to a new trial in a civil case.

Even assuming that the Constitution does not guarantee such a right in a criminal case, once the right is granted by statute a denial of due process may be found, apparently, if there are deficiencies in the way the right is implemented. Compare Griffin v. Illinois, 351 U.S. 12 (1956), holding that, while there is no constitutional right to an appeal of a criminal case in a state court, once the right is granted it is subject to the strictures of due process and equal protection (indigent's right to trial record for appeal). See also Burns v. Ohio, 360 U.S. 252 (1959)(unconstitutionality of filing fee for appeal as to indigents). Douglas v. California, 372 U.S. 353 (1963)(right to appointment of counsel on appeal). It should be noted, however, that while these decisions were purportedly based on both the due process and equal protection clauses, the denial of equal protection to indigents seemed to be the determining factor in each. There does seem to be a strong argument that here, where the Military Code mandates "action" by the appropriate appellate court,

after referral from the Judge Advocate General, on a new trial petition, the court's action must comport with constitutional standards.

An analysis of whether the procedures that were utilized in this case satisfy the Constitution though the motion for a new trial was not referred to the trial judge for action must consider how the plaintiff herein would be benefited by having the trial judge act on his motion. The benefits to him seem to be the following:

(a) The trial judge is familiar with the evidence introduced at trial, has been able to judge the credibility of the various witnesses, and is best able to evaluate the possible effect of the new evidence.

(b) The trial judge can be counted upon to be impartial and to utilize fair and effective fact-finding procedures to test the validity of the new evidence.

Under the military justice system the trial judge was not available to consider the new evidence, the court martial's jurisdiction having terminated at the rendering of its decision. See Jackson v. Taylor, 353 U.S. 569 (1957), which approved the resentencing of a defendant by the

appellate body instead of remanding the case to the court martial: "A court-martial has neither continuity nor situs and often sits to hear only a single case. Because of the nature of the military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded." (at 579)

Defendant analogizes this situation to the expiration of the term of a trial judge. In the latter case, defendant contends that there is no arguable constitutional requirement that the judge who presided at trial decide the motion for a new trial if it comes after the expiration of his term. Defendant points out that the Supreme Court has authorized federal courts in habeas corpus proceedings to decide the sufficiency of evidence to show constitutional violations warranting a new trial. Townsend v. Sain, 372 U.S. 293, 317 (1962). Thus, defendant argues, the Court has recognized that motions for new trials need not always be heard by the trial judge.

Clearly, it is preferable for the judge who heard the evidence at trial, as opposed to another judge, to hear the motion for a new trial, as he thus "may utilize the

knowledge he gained from presiding at the trial as well as the showing made on the motion" in making his determination. Brown v. United States, 333 F.2d 723, 724 (2d Cir. 1964). It could be argued that motions for new trials may be permissibly heard by someone other than the trial judge only where extraordinary circumstances mandate. Thus, arguably, the military's procedure for deciding new trial motions violated the accused's right to due process since it precluded a hearing before the trial judge even where such a hearing would be feasible.

Defendant points to Gusik v. Schilder, 340 U.S. 128 (1950), where a petitioner for habeas corpus relief from a court martial conviction was required to petition the Judge Advocate General for a new trial in order to exhaust his military remedies before coming to the federal courts. Defendant suggests that Gusik was a sub silentio approval of the military system for handling new trial motions. However, the adequacy of the system was not passed upon by the Court in that case.

The procedure by which the convening authority and the appellate court ascertained or sought to ascertain the factual basis and background for the new trial motion --

the ex parte investigation -- does not comport with generally accepted judicial methods for arriving at the truth. Two omissions present themselves in particular: (1) the failure to hold an evidentiary hearing at which plaintiff could present proofs and for which he would have the benefits of compulsory process, and (2) the failure to allow plaintiff's counsel to cross-examine those witnesses interviewed by the investigator upon whose report both the convening officer and the appellate court relied.

(1) There is no requirement that an evidentiary hearing be held whenever a defendant moves for a new trial. See, e.g., United States v. Catalano, 491 F.2d 268 (2d Cir. 1974). Compare United States ex rel. Conomos v. LaVallee, 363 F. Supp. 994 (S.D.N.Y. 1973), where a habeas corpus petitioner had sought a hearing in state court on his motion for a new trial on grounds of newly discovered evidence and the hearing had been denied. The federal court found that the denial raised no constitutional issue since the purported new evidence "obviously" was not newly discovered. There is no requirement of a

hearing even where the judge considering the motion is not the one who presided at the original trial. United States v. Persico, 339 F. Supp. 1077 (E.D.N.Y.) aff'd 467 F.2d 485 (2d Cir. 1972), cert. denied 410 U.S. 946 (1973).

Refusing to grant a hearing has, however, been held an abuse of discretion where a third party has confessed to the crime for which the defendant was convicted. In Casias v. United States, 337 F.2d 354 (10th Cir. 1964), it is said that: "No one can doubt that a confession by another party to the crime for which the petitioner has been tried and convicted, if discovered after conviction, would be grounds for a new trial. The integrity of the confession is a matter within the province of the trial Court.... We hold only that the petitioner is entitled to be heard on his motion, and the case is accordingly remanded for that purpose." (at 356)

Similarly, in DeBinder v. United States, 303 F.2d (D.C. Cir. 1962), the Court said at 204:

> The credible confession of another to the commission of a crime for which an accused has been convicted is, of course, sufficient ground for a new trial. ... This "confession" should be tested in open court. [The alleged confessor] should be given the opportunity to appear and testify at a hearing on appellant's motion for a new trial.

On March 22, 1972, the commanding officer at the Rossier Labo-

Older cases, however, hold that such confessions do not of themselves justify a new trial, even if believed. See, e.g., Hauck v. Hiatt, 141 F.2d 812, 813 (3rd Cir. 1944), stating in such a situation that "if [petitioner] can demonstrate his innocence, his application should be to the President of the United States for executive clemency." Accord, Figueroa v. Saldana, 23 F.2d 327 (1st Cir. 1927). Cf. McGuire v. Hunter, 138 F.2d 379 (10th Cir. 1943).

It can be argued that the newer decisions are more consonant with modern law's elevation of justice over form, but there is still an open question whether what amounts to an abuse of discretion by a trial judge in refusing to grant a hearing on a new trial motion brought pursuant to Rule 33, Fed. R. Crim. P., would constitute a denial of due process by a tribunal not subject to that rule.

(2) Where a hearing is not held on a new trial motion, judges usually rely upon affidavits or depositions to resolve the factual issues presented. An ex parte investigation by a judge on a motion for a new trial has been characterized as "[s]o fraught with possible injustice

and peril to the rights of a party" as to be reversible error where the investigation partially influenced the judge's decision. Gordon v. United States, 178 F.2d 896, 901 (6th Cir. 1949), cert. denied, 339 U.S. 935 (1950). (In Gordon the District Court's decision was sustained on other grounds.) Similarly, it has been held error for a judge to take oral testimony on a motion for a new trial and not allow the defendant to cross-examine the witness. State v. Ward, 135 Wash. 485, 238 P. 11 (1925).

While it may be argued that the failure of the military authorities to utilize normal judicial adversary proceedings in ascertaining the facts behind plaintiff's motion for a new trial is a denial of his right to due process of law guaranteed by the Fifth Amendment, there is no authority to support this proposition directly. The failure to allow plaintiff's counsel to participate in the fact-finding procedure does, however, at least arguably violate plaintiff's Sixth Amendment right to the assistance of counsel under the language of United States v. Wade, 388 U.S. 218, 224 (1967), which interpreted that amendment to require that a criminal defendant's

counsel be present at all "critical stages of the proceedings". (There counsel were required at pre-trial line-ups.) It can be argued that the fact-finding process upon which a motion for a new trial is decided is such a "critical stage".

The argument that the new trial motion should have been considered by the trial judge because of his trial experience and that failure to have the motion considered by the trial judge is thus a violation of due process does not seem convincing in light of the authorities. There is no authority that failure to hold an evidentiary hearing on the motion in these circumstances is a violation of due process, though there is some authority that it would be an abuse of discretion for a judge subject to Rule 33, Fed. R. Crim. P. The argument that the reliance of the decision-makers here upon an ex parte investigation to resolve the factual issues is a denial of due process and a violation of plaintiff's Sixth Amendment right to counsel has superficial plausibility only, since motions for a new trial may be decided without an evidentiary hearing.

Since the issue before this Court is whether the procedure by which the new trial motion was considered was proper, rather than whether plaintiff should have been granted a new trial, a hearing on the question of whether he should be given a new trial would not be warranted.

Other grounds urged by plaintiff for overturning his assault conviction are also without merit. His contention that the conviction must be set aside because he was found guilty by a non-unanimous jury cannot be sustained. Plaintiff points to Johnson v. Louisiana, 406 U.S. 356 (1972), in which the Supreme Court, by a 4-1-4 vote, affirmed the constitutionality of non-unanimous juries in state criminal proceedings. Mr. Justice Powell in concurrence indicated that he would decide differently if the Court were considering federal trials, thus providing a five man majority which would hold non-unanimous federal jury convictions to be unconstitutional. However, Justice Powell predicated his view upon the theory that the Sixth Amendment in its entirety did not apply to the states. The Sixth Amendment right to a jury trial does not apply to military courts, Whelchel v. McDonald, 340 U.S. 122,

'1950). Thus it would seem to follow from the view expressed in Johnson that tice Powell could not be expected to hold that unani is juries are constitutionally required in military courts.

Plaintiff contends that the line-up in which he was first identified by the victim of the assault was improperly suggestive. Assuming arguendo that he is correct, the applicable test is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Neil v. Biggers, 409 U.S. 188, 199 (1972). Many different factors must be considered in determining the reliability of an identification, Neil, supra, at 199-200, and the determination is best made by the trial judge who has seen and heard the witnesses. For that reason, resolution of this question upon habeas corpus review "marks the rare exception." United States ex rel Phipps v. Follette, 428 F.2d 912, 916 (2d Cir.), cert. denied, 400 U.S. 908 (1970). Here the trial judge gave the plaintiff the opportunity to object to the line-up at a hearing held before the jury was brought in;

plaintiff declined to do so.[6] Plaintiff was allowed to examine the man who was responsible for the line-up in some detail at trial, in an apparent attempt to discredit the identification in the minds of the jury.[7] Under these circumstances, it would not be appropriate for this Court to now consider de novo the question of the validity of the identification made at and subsequent to the line-up.

The two complaints in this case are dismissed. Plaintiff's motions for summary judgment are denied. Defendant's cross-motions for judgment in his favor on the pleadings are granted.

SO ORDERED.

April 14, 1975

Milton Pollack
U.S. District Judge

6/ Court martial transcript at 21. The transcripts of both courts martial were submitted to this Court and have been considered for the purposes of this opinion.

7/ Transcript at 163 and following pages. See also transcript at 316-18. Defense counsel argued the suggestiveness of the line-up procedure to the jury during his summation. Transcript at 358-59.

In its opinion affirming the judgment of conviction, and denying the de-

MOTION FOR SUMMARY JUDGMENT (Filed December 26, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LUIS A. LEBRON, JR.,

Plaintiff,

-against-

UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

Docket #74 CIVIL 4942
(MP)

NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF PLAINTIFF - RULE 56, FRCP

----------X

S I R:

PLEASE TAKE NOTICE that upon the annexed affidavit of H. ELLIOT WALES, the summons and complaint, and the proceedings of the court martial below, the undersigned will move this Court, before District Judge Milton Pollack, on January 24, 1975, at 2:15 o'clock, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of the plaintiff and against the defendant, on the ground that there are not any genuine issues as to any material facts, and that plaintiff is entitled to judgment as a matter of law.

Yours, etc.,

H. Elliot Wales

H. ELLIOT WALES
Counsel for Plaintiff
747 Third Avenue
New York, New York 10017
(212) 421-1993

Dated: New York, New York
December 19, 1974

TO: CLERK OF THE COURT

TO: UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LUIS A. LEBRON, JR.,

Plaintiff,

-against-

UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

----------X

Docket #74 CIVIL 4942
(MP)
COUNSEL'S AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

H. ELLIOT WALES, being duly sworn, deposes and says:

I am counsel for the plaintiff Luis A. Lebron, Jr., and submit this affidavit in support of his motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This is an action pursuant to Title 28 USC 2241 to 2254 to set aside the judgment of conviction and sentence imposed upon the plaintiff after a trial by a general court martial of the United States Air Force.

On January 12, 1971, the plaintiff was convicted by a general court martial on two specifications on possession and use of a narcotic drug, on August 27, 1970, in violation of Article 134 of the Uniform Code of Military Justice.

The court martial trial was conducted at the Keesler Air Force Base, Mississippi. The Court imposed a sentence of six months, forfeiture of pay, and reduction of rank.

On February 17, 1971 the commanding officer at the Keesler Base approved the judgment of conviction and sentence.

On April 6, 1971 the office of Judge Advocate General, United States Air Force, examined the record of trial and found it to be supported in law. The Judge Advocate General directed that there be no review of the proceedings by the Court of Military Review. Docket #ACM 20846. See Appendix A - copy of the approval of the judgment and sentence by both the convening authority and the Judge Advocate General.

Plaintiff is not now in custody, nor has he been at any time since the inception or this proceeding in the District Court. However, he has suffered substantial collateral consequences as a result of this conviction, which includes a three year prison sentence imposed upon him for a subsequent court martial conviction.

Parenthetically I should note that this Court has been asked to review also the proceedings in that later court martial conviction, and its affirmance on appeal by the Court of Military Review. 74 Civil 4943 (MP) of this court.

This court has jurisdiction over the subject matter of this action for plaintiff was convicted in violation of the statutes and laws of the United States.

Originally this action was brought in the United States District Court for the District of Columbia. Docket #2223/73. On October 23, 1974, that court transferred this proceeding to this court, pursuant to 28 USC 1404, on the grounds of more appropriate venue.

Plaintiff was charged and convicted of violating Article 134 of the Uniform Code of Military Justice. While this statute was initially declared unconstitu-

designated as the p... as competent authority may direct.

tional by the United States Court of Appeals for the District of Columbia at the time that this proceeding was commenced, it has subsequently been declared constitutional by the Supreme Court of the United States. Secretary of the Navy v. Avrech, 417 U. S.____94 S.Ct. 3039, 42 USLW 5233, reversing 477 F2d 1237 (CA-DC, 1973). Also see companion case of Parker v. Levy, 417 U. S.____, 94 S. Ct. 2547, 42 USLW 4979.

In spite of the decision of the High Court in the Avrech and Levy matters, we submit in our memorandum of law that Article 134 is unconstitutional as it applies to the conduct for which Lebron was convicted in this matter.

In its opinion in the Levy case, the Supreme Court made it clear that Article 134 in its general terms could apply to conduct which was peculiarly military, and not otherwise capable of definition. However, the High Court made it clear that Article 134 does not apply to conduct which is essentially a common law or civilian offense, and which is capable of definition. 42 USLW 4984, 4985.

In this regard we should note that the Uniform Code of Military Justice in other regards does specify the traditional common law and civilian offenses. As such we submit that the statute is unconstitutional as it applies to the Lebron conviction.

On August 27, 1970, the Center Vice Commander of the Keesler Technical Training Center, in writing, authorized a search of the person of the plaintiff, and authorized a search of narcotics, dangerous drugs, and associated paraphernalia. See Appendix B - a copy of the authority to search and seize.

The authority to search and seize was made on the basis of oral and unsworn representations of Special Agent Latternee N. Montague, Jr., that plaintiff was in possession of narcotics, in violation of law. Pursuant to the said authority to search and seize, Special Agent Latternee N. Montague, Jr. did search the person and premises of the plaintiff, and did seize the narcotic drug.

At the trial the narcotic drug so seized was introduced into evidence, and its possession by the plaintiff was the basis of a court martial conviction of the plaintiff.

We submit in our memorandum of law that it was unconstitutional, and in violation of the Fourth Amendment to the United States Constitution, for the trial court to have permitted the receipt and admission of evidence seized as a result of a search which had been authorized on the basis of oral and unsworn representations and statements. The Fourth Amendment to the United States Constitution requires that an authorized search and seizure be made on the basis of written and sworn statements.

As a result the conviction of the plaintiff was secured on the basis of evidence unconstitutionally obtained, and the conviction should be set aside. Also the search warrant was improperly secured, because false factual information was presented in support of the application for the search warrant.

As of yet the defendant has not filed and served its answer, though the time has long since expired. Of course we do not intend to take a default upon the government, and we would expect the United States Attorney to promptly file and serve its answer. However, the issue is ripe for adjudication by a motion for summary judgment as the government's anseer was due quite some time ago.

There are no admissions on file, no answers to any interrogatories, nor any depositions. We do not see that any discovery and inspection was required in this matter. This case involves solely three issues of law posed by the pleadings, the transcript and proceedings of the court martial case, and the administrative decision denying further appellate review. A copy of the complaint is annexed hereto - Appendix C.

We submit also the transcript of the trial proceedings in the court martial. We doubt it will be necessary for the Court to study the transcript. This motion presents only questions of law, and not questions of fact.

As counsel for the plaintiff, I request the opportunity to personally appear and orally argue this motion.

H. Elliot Wales

Sworn to before me this
19th day of December, 1974

LILLIAN KURTZER
COMMISSIONER OF DEEDS
CITY OF NEW YORK NO. 4-652
Certificate Filed in New York County
Commission Expires December 1, 1976

LILLIAN KURTZER
COMMISSIONER OF DEEDS
CITY OF NEW YORK NO. 4-652
Certificate Filed in New York County
Commission Expires December 1, 1976

MOTION FOR SUMMARY JUDGMENT (2) (Filed December 19, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LUIS A. LEBRON, JR.,

Plaintiff,

-against-

UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

----------X

74 CIVIL 4943
(MP)

NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF PLAINTIFF - RULE 56, FRCP

S I R:

PLEASE TAKE NOTICE that upon the annexed affidavit of H. ELLIOT WALES, the summons and complaint, the answer, and the proceedings of the court martial below, the undersigned will move this Court before District Judge Milton Pollack, on January 17, 1975, at 2:15 o'clock, in the afternoon, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of the plaintiff and against the defendant, on the ground that there are not any genuine issues as to any material facts, and that plaintiff is entitled to judgment as a matter of law.

Yours, etc.,

H. Elliot Wales

Dated: New York, New York
December 11, 1974

H. ELLIOT WALES
Counsel for Plaintiff
747 Third Avenue
New York, New York 10017
421-1993

TO: CLERK OF THE COURT

TO: UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUIS A. LEBRON, JR.,

Plaintiff,

-against-

UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

74 CIVIL 4943
(MP)

COUNSEL'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

H. ELLIOT WALES, being duly sworn, deposes and says:

I am counsel for the plaintiff Luis A. Lebron, Jr., and submit this affidavit in support of his motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This is an action pursuant to Title 28 USC 2241-2254 to set aside the judgment of conviction and sentence imposed upon the plaintiff after a trial by a general court martial of the United States Air Force.

On December 17, 1971, the plaintiff was convicted of assault, in violation of Article 128 of the Uniform Code of Military Justice, by a general court martial, following a trial by jury at the K eesler Air Force Base, Mississippi. The Court imposed a three year sentence at hard labor, forfeiture of all pay and allowances, and a bad conduct discharge.

On March 22, 1972, the commanding officer at the Keesler Base approved the judgment of conviction and sentence.

On January 4, 1973, the United States Air Force Court of Military Review affirmed the judgment of conviction and sentence. The opinion of the Court is reported at 46 CMR 1062.

On March 26, 1973, the United States Court of Military Appeals denied the plaintiff's petition for grant of review of the decision and opinion of the United States Air Force Court of Military Review. 46 CMR 1323.

The plaintiff is still serving the balance of the three year sentence imposed by the general court martial on December 17, 1971, even though he is now on parole.

Issue has been joined in this matter, as the defendant has answered the complaint. In substance the answer basically admits all of the factual assertions of the complaint, and does not address itself to any of the jurisdictional allegations or the conclusions of law.

This action had originally been brought in the United States District Court for the District of Columbia. Docket #2224/73. On October 23rd, 1974 the Court heard oral argument on plaintiff's motion for summary judgment and on defendant's motion for judgment on the pleadings. After hearing full oral argument, Chief Judge George Hart decided to transfer this case to the Southern District of New York. An appropriate order was entered to that effect. See appendix.

There are no admissions on file, no answers to any interrogatories,

nor any depositions. No discovery and inspection was required in this matter.

This case involves solely an issue of law posed by the pleadings, the transcript and proceedings of the court martial case, and the opinion of the United States Air Force Court of Military Review. Basically we accept the statement of facts, and the posing of the issues of law, as discussed by the United States Air Force Court of Military Review in its opinion reported at 46 C MR 1062. As such the Court is invited to read that opinion. Basically this action, and this motion for summary judgment, involves the question of whether the Court of Military Review properly decided three points of law advanced in that appeal.

As provided by Article 52 (a) (2) of the Uniform Code of Military Justice (10 USC 852 (a) (2), plaintiff was convicted at the court martial by a vote of two-thirds of the members of the jury. We submit that a conviction by less than a unanimous vote by a court martial is contrary to the United States Constitution which requires a unanimous vote of the jury in order to convict. The Court of Military Review rejected this argument.

On January 21, 1972, after plaintiff's conviction by the general court martial, but prior to the approval of the conviction and sentence by the convening authority - the commanding officer of the Keesler Technical Center, Mississippi, plaintiff, by his counsel, applied to the convening authority for a new trial, and submitted in support of the application, an affidavit of a fellow air man - Brendon Gill - in which Gill confessed to the offense in question for which the plaintiff had been convicted. The convening authority conducted an ex parte investigation, and on the basis of an investigative report, denied the motion for a new trial.

We submit that plaintiff was denied his right to due process, his right to produce Brendon Gill in court to appear before the trial Judge to testify, and his right to question Gill in open court before the Military Judge. In addition, we submit plaintiff was denied his right to confront the investigator and his investigative report.

In its opinion the Court of Military Review rejected our argumen ts that plaintiff was denied his rights to a new trial without an evidentiary hearing, without an opportunity to subpoena and produce a witness in court, and without an opportunity to confront a witness in court.

On August 13, 1971, prior to the trial, the military authorities at the Keesler Technical Training Center, Mississippi, conducted a line-up in which plaintiff was a member. At that time the victim of the assault - Charles Kilburn - identified plaintiff as the person who assaulted him.

We submit that the Court of Military Review was in error in rejecting our argument that the line-up was conducted in an improperly suggestive manner, in violation of the Constitution.

We submit a memorandum of law which makes reference to the discussion of the Court of Military Review on each of these issues. While the Court of Military Appeals denied our petition for review, it did not write an opinion.

We submit also the transcript of the trial proceedings in the court martial. However, inasmuch as the plaintiff accepts the factual assertion and the posing of the issues of law as discussed in the opinion of the Court of Military Review, I doubt that it will be necessary for the Court to study the transcript. Also as the defendant does not dispute the basic factual assert-

ions of the complaint of the plaintiff, this motion presents only genuine questions of law, and not any questions of fact. Essentially this Court will have to study the opinion of the Court of Military Review, and decide whether that court properly decided those three issues of law. A copy of the complaint and the answer are attached.

As counsel for plaintiff, I request the opportunity to personally appear and orally argue this motion.

H. ELLIOT WALES

Sworn to before me this

11th day of December, 1974

Lillian Kurtzer

LILLIAN KURTZER
COMMISSIONER OF DEEDS
CITY OF NEW YORK NO. 4-652
Certificate Filed in New York County
Commission Expires December 1, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUIS A. LEBRON, JR.,

Plaintiff,

-against-

UNITED STATES SECRETARY OF THE AIR FORCE,

Defendant.

: 74 Civil 4943 (MP)

: PLAINTIFF'S COUNSEL'S AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

H. ELLIOT WALES, being duly sworn, deposes and says:

This affidavit is submitted to assist the Court to resolve the issue of whether the application for a new trial was in fact presented to the trial judge.

We submit that the petition for a new trial was not submitted to the trial judge, and was decided by the convening authority General Madsen, and his staff Judge Advocate, Colonel Birdsong.

Exhibit "A" shows that Colonel William Gobrecht was the Military Judge who presided at the trial. He is attached to the Maxwell Air Force Base in Alabama, and travelled to Keesler Air Force Base, Mississippi solely to preside at the trial.

Colonel Clifton Nicholson acted as president of the court which means he was the foreman of the jury.

Exhibit "B" is the supplemental review conducted by the staff Judge

Advocate, Colonel Birdsong, and his staff attorney, Marguerite Williams. This supplemental review followed the filing of a petition for a new trial, prior to the review by the post commanding officer. We must recall that Lebron was convicted by a jury on December 17, 1971. On March 22, 1972 the convening authority approvied of the findings and sentence. This review was based upon an application for a new trial which had been filed in that interim period. In part the review states:

> "At the request of the Judge Advocate general you deferred your action on the record of trial of the above accused until the investigation of the purported confession of Bendell Gill was completed. The investigation has now been brought to a reasonable conclusion.
>
> **********
>
> On 21 January 1972 the accused's father and his attorney, Sheldon Cohen, presented to the staff Judge Advocate the confession of Gill, copy of which is attached to the original review.
>
> **********
>
> Bendell Gill was made available by the attorney Cohen and was interviewed in New York on 8 February 1972.
>
> **********
>
> Gill stated that he was sure that it was he who assaulted the airman on 16-17 November 1970...
>
> **********
>
> In his verbal statement Gill stated that he was sure that he committed the assault on Kilborn on 16 November, as he recalled that he was questioned by OSI agents the following day and participated in a lineup, but he was not identified as the assailant.
>
> **********
>
> In my opinion the OSI investigation has produced discrepancies in Bendell Gill's statement of such character that you would be justified in concluding that it is not a confession to the crime of which the accused has been convicted. <u>If you so find from the evidence that has been presented to you, it would be appropriate for you to take action on the record of trial without further delay."</u> (emphasis added)

Exhibit "C" is a copy of the affidavit of Bendell Gill.

In its opinion affirming the judgment of conviction, and denying the defendant's application for a new trial, the Court of Military Review discussed this very point at 46 CMR 1065 - 1068. The Court noted at the top of page 65 that counsel assigned as error the fact that the convening authority rejected the new trial application and never made it "part of the trial record".

In part, the Court of Military Review stated:

> "Following trial, but before action on the record was taken, an attorney retained by the accused's family submitted to the convening authority an affidavit by a former airman named Gill.
>
> **********
>
> Although the staff Judge Advocate proceeded to prepare a review, the convening authority deferred taking action on the record, and caused the office of Special Investigations to investigate the matters presented him by the accused"s counsel. Upon completion of the investigation the staff Judge Advocate, in a supplemental review, carefully examined the results of the investigation and analyzed the affidavit, together with certain verbal statements made by Gill to the investigators.
>
> **********
>
> Initially we know that the attorney tendering Gill's affidavit recognized that he was not submitting a petition for a new trial. While the Code gives to an accused the right to petition for a new trial after the case is acted upon by the convening authority, it is silent as to the method by which he could obtain relief before the first review.
>
> **********
>
> This however, is not the only action open to him, for he can order a rehearing pursuant to Article 63 of the Code.
>
> **********
>
> The post - trial investigation moreover, was not conducted pursuant to any law or regulation entitling the defendant access to it, hence the defendant complained as to its ex parte nature...is without merit".

It is obvious that this application for a new trial was never presented to Colonel Gobrecht, the trial judge.

The application was decided solely by the convening authority, and his staff Judge Advocate, who were in effect the party who brought the criminal charges against Lebron.

Article 73 of the Code of Military Justice (10 U.S.C. 873), labeled petition for a new trial speaks solely of a petition "after approval by the convening authority".

Article 63 of the Code of Military Justice (10 U.S.C. 863), states that "if the convening authority disapproves the findings and sentence of a court martial he may...order a rehearing".

The Code of Military Justice just does not have a provision comparable to Rule 33 of the Federal Rules of Criminal Procedure, which rule permits the trial court to consider an application for a new trial prior to the entry of judgment of conviction. The Court of Military Review is apparently correct when it states that the Code of Military Justice "...is silent as to the method by which he can obtain relief before the first review." 46 CMR at 1065.

H. ELLIOT WALES

Sworn to before me this
6th day of March, 1975

LILLIAN KURTZER
COMMISSIONER OF DEEDS
CITY OF NEW YORK NO. 4-652
Certificate Filed in New York County
Commission Expires December 1, 1976

GENERAL COURT-MARTIAL ORDER (Filed October 23, 1974)

CORRECTED COPY ----- DESTROY ALL OTHERS

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS KEESLER TECHNICAL TRAINING CENTER (ATC)

KEESLER AIR FORCE BASE, MISSISSIPPI 39534

General Court-Martial Order
No. 3

17 February 1971

Before a general court-martial which convened at Keesler Air Force Base, Mississippi, pursuant to Special Order AD-74, this headquarters, dated 27 November 1970, was arraigned and tried:

AIRMAN LUIS A LEBRON, JUNIOR, FR095-42-8929, United States Air Force, 3381 Student Squadron.

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that AIRMAN LUIS A. LEBRON, JUNIOR, United States Air Force, 3381 Student Squadron did, at Keesler Air Force Base, Mississippi, on or about 27 August 1970, wrongfully have in his possession some amount of a habit forming narcotic drug to wit: heroin.

Specification 2: In that AIRMAN LUIS A. LEBRON, JUNIOR, United States Air Force 3381 Student Squadron did, at Keesler Air Force Base, Mississippi, on or about 27 August 1970, wrongfully use a habit forming narcotic drug, to wit: heroin.

PLEAS: To the Charge and to both Specifications: Not Guilty.

FINDINGS: Of all Specifications and the Charge: Guilty.

SENTENCE: To be confined at hard labor for six months, and to forfeit $133.20 per month for six months, and to be reduced to the grade of airman basic. (No previous convictions considered.)

DATE ADJUDGED: The sentence was adjudged 12 January 1971.

ACTION OF THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, Headquarters Keesler Technical Training Center (ATC), Keesler Air Force Base, Mississippi 39534, 17 Feb 1971

In the foregoing case of AIRMAN LUIS A. LEBRON, JR., FR095-42-8929, United States Air Force, 3381 Student Squadron, 3380 Technical School, only so much of the sentence as provides for confinement at hard labor for six months, forfeiture of $95.00 per ~~months~~ month for [illegible] months, and reduction to Airman Basic is approved and will be duly executed. The Center Correction Facility, Keesler Technical Training Center, is

FINAL ACTION ON GCM FILE COPY

389

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ACM-20846

Initialed:

GCMO No. 3, HQ KTTC (ATC) KAFB MS 39534, 17 FEB 1971

designated as the place of confinement and the confinement will be served therein, or elsewhere as competent authority may direct.

/s/ Frank M Madsen, Jr
FRANK M. MADSEN, JR., Major General, USAF
Commander

FOR THE COMMANDER

Albert G. Davis

ALBERT G DAVIS, JR, Capt, USAF
Asst Staff Judge Advocate

DISTRIBUTION
1 AB LEBRON, 3381 Stu Sq
1 LT COL KOHLER, HQ USAF (JAJTE2) Bldg 800, Maxwell AFB AL 36112
1 CAPT BAKER, HQ KTTC, TC
1 CAPT SASADU, HQ KTTC, DC
1 CR KTTC
1 TS
6 TSCT81
1 ATC (ATCJA) Randolph AFB TX 78148
1 ABSPA
3 ABSPC
10 HQ USAF (JAEA) WASH D C 20314
1 AAF
15 CBPOADMIN
10 JAM
1 USAFMPC (AFPMDRA2) Randolph AFB TX 78148
1 AFAFC (ES) 3800 York St Denver CO 80205

no appeal warranted

OFFICE OF THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE
6 APR 1971

The record of trial in this case has been examined in this office and found to be supported in law. The Judge Advocate General has not directed review by the Court of Military Review. This order accurately reflects the results of trial and action of the convening authority in this case.

FOR THE JUDGE ADVOCATE GENERAL

John C. Wasson

JOHN C. WASSON
Colonel, USAF
Judge Advocate

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

BENDELL GILL, being duly sworn, deposes and says that

I reside at 9115 South Lowe Ave, Chicago, Illinois 60620 (telephone 487-4737). I live there with my parents, my cousin and some foster children my parents take care of and my grand father.

I recieved a General Discharge from the US Air force under honorable conditions on October 22, 1973 from Mather AFB, Sacramento, California.

On or about Nov 16th & Nov 17th, probably around midnight of Nov. 16th, I was in the 3381st Student Squadron barracks. ~~and~~ I had gone there for the purpose of going into any room I found open and looking for wallets, watches or anything else of value. I went into the next to the last room on the right hand side of the main floor. The lights were out. There was one man sleeping in a bed in the room. I left the door open to get some light from the latrine across the hallway. His fatigue pants were laying on the

chair next to his bed. I picked up the pants and some keys on the bed post were disturbed and started to rattle. I searched the pockets and found his wallet with no money in it or his pockets. I put the pants down and picked up the keys and walked over to the wall locker and as I opened the door he woke up. He started to get up out of bed and asked me what me what I was doing there. I struck him on the temple and struck him two or three times more with a fire dash iron I had in my possession. I then ran out of the room and out of the building.

During that period of time I was starting from rooms about once a week and I was under investigation for these burglaries. I was assigned to a crew in charge of maintaining the commanding general's airplane.

Sworn to before me
this 18th day of June, 19 SHELDON COFFEE

Randall Lee

SUPPLEMENTAL REVIEW - STAFF JUDGE ADVOCATE

DEPARTMENT OF THE AIR FORCE
Headquarters Keesler Technical Training Center (ATC)
Keesler Air Force Base, Mississippi 39534

21 March 1972

TO: Commander
Keesler Technical Training Center

U N I T E D S T A T E S

v.

LUIS A. LEBRON, JR., FR 095-42-8929
Hq 3380 Air Base Group
(formerly 3320 Retraining Group)

SUPPLEMENTAL REVIEW

At the request of The Judge Advocate General you deferred your action on the record of trial of the above accused until the investigation of the purported confession of Bendell Gill was completed. The investigation has now been brought to a reasonable conclusion.

As you know, the implication of Gill as the perpetrator of the assault upon Charles Rodney Kilborn originated with Airman Heywood F. Hogans, an inmate of the Center Correction Facility. Hogans told the accused that his friend, Bendell Gill, had confided in him and his wife shortly after 17 November 1970 that he had had a close call a few nights previously when the occupant of a barracks room in which he was stealing awoke and he, Gill, struck him a few times and "hurt him pretty bad." Hogans said that after he became aware of the evidence in the accused's trial he realized that Gill had committed the crime for which the accused had been tried.

On 21 January 1972 the accused's father and his attorney, Sheldon Cohen, presented to the Staff Judge Advocate the confession of Gill, copy of which is attached to the original review.

The investigation conducted at your request by the Office of Special Investigations was painstaking and extensive, ranging in its search for witnesses as far from Keesler Air Force Base as Thailand. In pertinent part it disclosed the following:

Hogans executed a sworn statement on 2 February 1972, in which he related that he became acquainted with Gill, known to him only as "J. C." Gill, a former airman at Keesler, in late September or early October 1970; they soon became close friends and Gill confided in him his course of barracks thefts at Keesler and other bases. Sometime in November Gill told him that he had hurt an airman in a barracks in the Triangle Area when the airman awoke while Gill was in his room stealing. Later that month Hogans was in Gill's car with Sergeant Harold Curry, Jr., when Gill told Curry about the incident. Hogans was confined in the Keesler Corrections Facility on 16 December 1971 on a narcotics violation. He met the accused there for the first time and learned that he had been convicted of the assault of an airman in a barracks in the Triangle Area in November

1970. Recalling Gill's comments, he told the accused of them. Hogans was subsequently visited in January by the accused's father and the attorney Cohen. Later that day the accused showed him Gill's handwritten confession. Hogans noted that the language of the statement was almost exactly what he had previously told the accused. He was amazed at the statement, as he knew Gill as a man who would never confess to such a thing. Hogans told the investigator verbally that he had observed a jack handle in Gill's car and often wondered if Gill carried it as a weapon when stealing from rooms. Gill did not mention the jack handle, nor did he state what weapon he used, if any, to hurt the airman. Hogans recalled that in talking to the accused the first time, the accused told him the victim said he was struck with a lamp. Hogans told the accused about the jack handle in Gill's car and that Gill could have used the jack handle. He observed that Gill said in his confession that he had beat the airman with a jack handle.

Bendell Gill was made available by the attorney Cohen and was interviewed in New York on 8 February 1972. Advised of his rights under the Fifth Amendment to the Constitution and informed that previous statements made by him concerning this matter could not be used against him, he voluntarily made a verbal statement, in which he related that he made the previous statement in response to an appeal of the accused's father and with the belief that he could not be prosecuted by the Air Force or the State of Mississippi because he had been discharged from the service. He said he did not know the accused at Keesler at the time of the offense, but met him later when they were both confined in the Retraining Group at Lowry Air Force Base. He avoided the accused as he did not want to become involved in discussions of the assault for fear that the accused would become suspicious of him.

Gill stated that he was sure it was he who assaulted the airman on 16-17 November 1970, as that was the night he returned to the Shalimar Lounge in Biloxi to rejoin his wife, and while he was there someone stole his stereo tape player from his car, and on the following day he was questioned by OSI agents and participated in a lineup but was not identified as the assailant. He reported the theft from his car to the Biloxi police.

Gill said that he and his wife went to the Shalimar Lounge at approximately 2100 hours on 16 November, where they had reservations. He had only a sip of a drink when he became bored with the floor show and left his wife there at about 2330 hours while he drove his 1969 Oldsmobile Cutlass to Keesler. He intended to steal some money or something of value as he was broke. He drove to a barracks in the Triangle Area near the theater and parked on the street in front of the building. Peeking into the barracks through a partially open exit door he saw too many people moving around and decided to try another barracks. Crossing the street he entered the back entrance of another barracks. He knew only that it was a student barracks; he did not know the number of the building or the name of the squadron. He was dressed in "dressy jeans," a long

sleeve shirt and a short jacket. He had a lug-wrench type jack handle, the type used as a handle of an automobile jack, stuck inside the waist band of his jeans, under his jacket.

He tried the first doors on the right and the left, nearest the exit, and found them locked. He proceeded to the second door on the right and found the door slightly ajar. There was no light burning in the room. Entering, he opened the door about half way to permit light from the latrine across the hall to enter the room. He stood still for a few seconds to adjust his eyes to the light and to determine if the occupant was asleep. He could see that there was only one man in the room, sleeping on the bed to Gill's right, with his head near the windows and his feet toward the door. He was under the bedcovers, sleeping quietly. Gill saw a table with a lamp and some paper on it. A pair of trousers lay on a chair between the table and the bed. He picked up the trousers, took a wallet from a hip pocket and looked in it. Finding no money he put the wallet on the chair or the table. Then he saw a dogtag chain hanging on a bed-post at the head of the bed. He removed the chain and saw two or three keys on it. He did not recall seeing any dogtags. He walked to the wall locker that would be on the left as one entered the room, found the right key and opened a padlock on the door. He removed the padlock from the hasp and put it on the floor in front of the locker with the key still inserted in the lock. The keys were still on the dogtag chain when he put them and the lock on the floor. He searched the locker for about two minutes, but found nothing of value to him.

At that time the sleeping airman became restless in the bed. Suddenly he awoke and said something that Gill did not recall. The airman started to get up and was almost up when Gill reached him. He stood up and tried to grab Gill, and Gill swung the jack handle with his right hand in an arc more horizontal than vertical and struck the airman on the head. The airman stumbled and put his hands over his head for protection. Gill hit him a "couple" more times about the head. He could not say exactly where the blows landed. When he left the room the airman was lying on the floor moaning.

As he left Gill realized that he had three or four pieces of paper in his hand, not newspaper or magazine, nor a pad of paper or photographs or envelopes. To his recollection the papers were about the size of the 8x5 paper on the interview desk. He departed the building by the same door he had entered, dropping the papers in the hallway as he went. He did not stop or hide anywhere in the building once he left the airman's room.

Returning to his automobile he threw the jack handle on the rear floor and drove off the base. At first he said he went directly to the Shalimar Lounge, but when questioned about the condition of his clothing

he said he noticed blood on the front of his jeans and went home (881 Fayard Street, Biloxi) to change them. He also noticed some small blood stains on the right sleeve of his jacket.

He rejoined his wife at the Shalimar Lounge by midnight and remained there until approximately 0200 hours, 17 November. He could not recall any of his activities on the next day, but believed he reported the theft of his stereo tape player that day. He still had the jacket, which he agreed to release to the OSI. The trousers had been discarded. He had thrown the jack handle into some weeds near a bridge two or three blocks from Keesler Gate 2, on what he believed to be Division Street. He denied confiding his involvement in the assault to anyone; specifically, Heywood Hogans, Hogans' wife, Harold Curry, his own wife or any of his close friends or relatives.

(Several days after this interview Gill sent word to the OSI that he would leave the jacket at his mother's house in Chicago, but that he did not want to see or talk to the OSI agents again. Later, for the purpose of interrogating Gill at the scene of the assault where he could show his actions and movements as he related them on 8 February in New York, and with the consent and cooperation of the attorney Cohen, invitational travel orders to Keesler Air Force Base were issued and forwarded to Gill athis mother's address in Chicago by certified mail on 25 February 1972. The Postal Service receipt for the mail has been returned, postmarked 28 February 1972. To date the invitational travel orders have been ignored, and all efforts to contact Gill in Chicago have been unsuccessful.)

On 28 and 29 February 1972 Hogans was interviewed again, at which time he stated that he had not been entirely truthful in his first statement. He explained that after he was confined at Keesler on 16 December 1971 and had met the accused and learned that he had been confined in the 3320 he asked the accused if he was acquainted with Gill, who had been in the 3320 Retraining Group during the same period. The accused acknowledged that he had met Gill, but said he did not get acquainted with him. Hogans then told the accused about Gill's activities as a barracks thief at Keesler and the accused replied that both he and his father had suspected Gill as Kilborn's assailant.

The accused's father, who was in the Keesler area at the time, went to the Corrections Facility immediately after the accused told him of this conversation, and Hogans repeated the story of Gill's comments about hurting an airman. Later Hogans told the accused that Gill carried a jack handle in his car. The accused exclaimed that Gill probably used the jack handle to hit the victim, and he called his father immediately and imparted this information to him.

Hogans saw the accused's father again on 3 and 4 January 1972, when he returned to Keesler from New York, seeking information as to the whereabouts of Gill. Hogans told him he understood Gill was in Chicago, and that he had "in-laws" in Ocean Springs, Mississippi. On 18 January 1972 Hogans was visited by the accused's father and Attorney Cohen. They were interested in the jack handle Hogans had told of seeing in Gill's car. Hogans went over the story again. He did not know at that time that they had found Gill and obtained a confession from him. Hogans knew that the conversation in Gill's car, a 1969 Oldsmobile, occurred on or about 14 February 1971, but he agreed that it was in mid-November, 1970, as that was what the accused's father and the attorney apparently wanted him to say. Gill only said that he had had a close call and Hogans assumed he meant while he was in a barracks stealing. He did not say that he hurt anyone, nor did he say that he carried a jack handle or any other weapon when stealing in the barracks. Hogans said that he expanded on Gill's remarks since the accused's father seemed to be wealthy and was sparing no expense and he, Hogans, concluded that he might need such a friend to help him as he was facing a possible ten years' sentence.

Sergeant Harold Curry, Jr., and Sergeant Gary Orr were named by Hogans as passengers in the car and witnesses to Gill's comments. In subsequent interviews Curry admitted friendship with Gill but disclaimed recollection of the conversation in Gill's car as described by Hogans; and Orr stated that he did not arrive at Keesler until 30 November and did not meet Gill, Curry or Hogans prior to 1 December; that he rode in Gill's 1969 Oldsmobile with Curry and Hogans to play basketball in Mobile, Alabama, in early 1971, but he did not recall any comments by Gill about having a close call; and specifically he did not have any conversation with Gill or anyone else pertaining to any assault at Keesler.

Hogans' wife, Debra, was interviewed at her residence in Brooklyn, New York. She stated that she was staying in the Guest House at Keesler on a visit from 22 October 1970 to 31 October 1970, then she moved to Mississippi on 26 January 1971 and lived in Ocean Springs. She did not recall a person named Gill, but had heard of a man named "J. C." whose wife's name was Martha. She identified a photograph of Gill as the name she knew as J. C. She met Gill in April 1971, and a month later heard from Martha that Gill was in jail. She had never heard anyone mention robberies or assaults.

Records of Joe Bullard Oldsmobile Agency, Mobile, Alabama, contain an invoice dated 28 November 1970 showing that Bendell Gill, 881 Fayard Street, Biloxi, Mississippi, traded in a 1965 Chevrolet Impala on the purchase of a 1969 Oldsmobile Cutlass 2-door hardtop on 28 November 1970.

Records of the Mississippi Motor Vehicle Tag division disclose a 1965 Chevrolet Impala registered by Gill in Harrison County (Biloxi) on 6 February 1970.

The 1965 Chevrolet Impala was sold by Joe Bullard to Big Hearted Eddie, a used car dealer, Mobile, Alabama, on 3 December 1970, and was traced to its present owner, Glendon McNeeley, Prichard, Alabama.

In an interview McNeeley stated that he had not altered the seat or floor coverings in the car and in his opinion they were the original factory furnished coverings. He released the seat and floor coverings to the OSI. A rusty, dirty, one-piece lug/tire iron was found in the trunk, which McNeeley said was in the car when he purchased it. This item was also released to the OSI.

Records of the Biloxi Police D epartment fail to show any complaint of larceny made by Bendell Gill in November, 1970. They do, however, contain a record of the receipt of a complaint of one Evelyn Williams at 1035 hours on 17 November 1970 of the larceny of an automobile radio car tape at the Shalimar Lounge between 9 P.M. 16 November and 2 A.M. 17 November 1970.

Evelyn Williams, now married to Sergeant George E. Mason, was interviewed with her husband. They were engaged on 16 November 1970 and spent the evening at the Shalimar Lounge, recalling the date by reason of the fact that it was opening night after redecoration of the lounge, a popular entertainer was playing that night, and reservations were necessary for guests, and by the complaint of the theft of the tape player. They were acquainted with "J. C." Gill, whom they identified from a photograph as Bendell Gill, and his wife Martha. They claimed no close relationship, and no personal knowledge of Gill's activities and associates. Howev er, they recalled that he was a close friend of Hogans and Curry. They stated that at no time during the night at the Shalimar Lounge did they see Gill, his wife, his sister-in-law, or any of his associates. They explained, however, that there was a large crowd at the Lounge and these people could have been there and they did not see them. Subsequent to 16 November 1970 neither Gill nor his wife or his associates mentioned anything in their presence indicating that Gill had "hurt" an airman in a barracks at Keesler.

A careful perusal of Gill's statement of 18 January 1972 and the transcription of his oral statement of 8 February 1972 reveal some discrepancies that indicate his unfamiliarity with the scene and circumstances of the crime. In addition, there are conflicts in his two statements, as well as serious inconsistencies between them and the facts established in the trial and the investigation. For instance:

In his verbal statement Gill said that he was sure that he committed the assault on Kilborn on 16 November, as he recalled that he was questioned by OSI agents the following day and participated in a lineup, but he was not identified as the assailant.

The record shows that an intruder fitting Gill's general description had been seen coming out of a room in a barracks of the 3386th Student Squadron that same night. As Gill had a record of barracks theft, and as the intruder was using a method of operation similar to Gill's, Gill was interrogated the next morning concerning that offense and the assault of Kilborn. He furnished an alibi for both incidents by claiming to be in the Shalimar Lounge with his wife and sister-in-law the night before. The lineup in which he participated was for the unlawful entry in the 3386th barracks, not for the assault on Kilborn. The witnesses who were unable to identify him were those airmen who saw the intruder in the 3386th barracks. Kilborn, of course, was then in a comatose condition in the hospital.

In his written statement Gill stated that when he entered the room he opened the door halfway to get some light from the latrine across the hallway. The fact is that the latrine was on the opposite side of the hall, but it was across from the room next to the victim's room. The door of the latrine was recessed, so that little light would shine into the victim's room from the latrine lights. In his verbal statement Gill said he opened the locker that was on the left as he entered the room. The record shows that the locker that was rifled was on the right as one enters the room, facing the foot of the victim's bed. (See Prosecution Exhibit 4, Defense Exhibits D & F)

In his written statement Gill stated that he removed the victim's fatigue pants from a chair next to the victim's bed, and that as he did so some keys on the bedpost were disturbed and started to rattle; he searched the pockets and found a wallet but no money; whereupon he took the keys and went to the wall locker; as he opened the locker door the victim awoke and started to get out of bed, asking Gill what he was doing there, and Gill struck him with a "tire jack iron" he had in his possession and ran out of the room and the building.

In his verbal statement Gill said that he saw the keys on the bedpost, not that they rattled, and after he went through the wallet he took the keys and opened the wall locker, taking the padlock off the hasp and putting it on the floor in front of the locker with the key inserted in it and the chain still attached. He examined the contents of the locker for about two minutes before the victim awoke and started to get out of bed. After he struck the victim he ran out of the room, leaving the victim lying on the floor moaning.

The evidence shows that the keys were on the bedpost at the opposite side of the bed from the chair where the pants were lying. (See Exhibit 4) It would have been impossible to disturb the keys by moving the pants, as Gill stated in his first statement. Kilborn's broken chain was found under his body, while the tags and keys, inserted in the wall locker lock, were found on the foot of his bed. The chain was not still attached to the keys,

as asserted by Gill. The locker, locker drawer and table drawer were found in disarray, a circumstance completely incompatible with Gill's first statement that the victim awoke as he opened the locker door and that he ran from the room immediately after he struck him. Kilborn's in-court testimony was that he awoke as his assailant reached across him to take the keys from the bedpost, although he had indicated by uttering the word "wallet" to the OSI agent when he first began to regain his power of speech that he awoke to see the assailant with his wallet. Neither version is consistent with Gill's statements.

ONLY IMPORTANT ITEM *

Furthermore, all of the medical evidence, as well as the physical evidence in the room when Kilborn was found that morning indicates that his injuries were of such severity that it would have been impossible for him to get up from the floor and get into the bed, if his assailant had left him on the floor, as claimed by Gill.

The jacket released by Gill to the OSI in Chicago and the leather seat covers, carpets, rubber mats, sample of foam rubber and tire wrench from the Chevrolet automobile owned by him on 16 November 1970 were sent to the Federal Bureau of Investigation for laboratory examination. A report of the results of the chemical and microscopic analyses states that no blood was identified on any of these items, and no head hairs like those present in the samples of Kilborn's hair were found on any of the items.

WHY NOT INTRODUCED AT TRIAL ?

Finally, Gill's statements provide no explanation for the broken, blood-stained table lamp. The lamp was resubmitted to the FBI Laboratory with samples of Kilborn's hair. The examination disclosed a single brown hair in blood adhering to the shade, and several brown head hairs in blood adhering to the felt of the base of the lamp. All of the hairs except two had been broken at the basal end. The remaining two had crushed areas on their shafts and both had been forcibly removed from the scalp. All of the head hairs microscopically matched the head hairs in the samples of Kilborn's hair, and, accordingly, originated either from Kilborn's head or from another person whose head hairs exhibit the same microscopic characteristics.

This evidence establishes beyond reasonable doubt that Kilborn's assailant struck him with the lamp, as he testified, and not with a tire jack iron or jack handle, as stated by Gill.

In my opinion the OSI investigation has produced discrepancies in Bendell Gill's statement of such character that you would be justified in concluding that it is not a confession to the crime of which the accused has been convicted. If you so find from the evidence that has been presented to you, it would be appropriate for you to take action on the record of trial without further delay.

You are again advised that the original review constitutes this reviewer's summary of the evidence, opinion as to the adequacy and weight of evidence, effect of any error or irregularity respecting the proceedings, and recommendations as to the action to be taken with regard to the findings and the sentence. As the convening authority in this case, you are empowered to weigh the evidence, judge the credibility of the witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Before approving a finding of guilty you must determine that such finding is established to your satisfaction beyond a reasonable doubt by competent evidence properly admitted before findings. In acting on the findings and sentence, you are empowered to approve only such findings of guilty and the sentence, or such part or amount of the sentence, including a sentence which is changed from, but is lesser than, that adjudged by the trial court, as you find correct in law and fact and as you in your discretion determine should be approved.

A form of action, carrying into effect the recommendations of the original review, should they meet with your approval, is attached.

Marguerite L. Williams

MARGUERITE L. WILLIAMS
Attorney

I have read the record of trial and the foregoing review. I concur with the review and the opinions and recommendation made therein.

Samuel E. Birdsong

SAMUEL E. BIRDSONG, JR., Colonel, USAF
Staff Judge Advocate

AUTHORITY TO SEARCH AND SEIZE

AUTHORITY TO SEARCH AND SEIZE

Special Agent Latternee N. Montague, Jr, OSI Det 904, Keesler AFB, MS

has informed me that he is investigating the offense of use and possession of heroin on Keesler AFB, MS on 27 Aug 70. and has requested that

I authorize a search of the (person of Amn LUIS A. LEBRON, JR, FR095-42-8929)

(premises known as Room 146, Bay 1F, Bldg 7401, Keesler AFB, MS)

and the seizure of the following specified property: Narcotics, dangerous drugs, marihuana, and associated paraphernalia, correspondence, notes, books, photographs, or other items which have reference to or indicate use, sale, purchase, or possession of a narcotic, marihuana, or dangerous drug by LEBRON or other members of the USAF.

Having carefully considered the matters presented to me in support of that request, I am satisfied that there is probable cause to believe that the property specified above is being concealed on the (person) (premises) described. I am further satisfied from the matters presented that the said property:

(1) [X] Is or has been used, designed, or intended for use, as the means of committing the criminal offense being investigated.

(2) [X] Was illegally obtained as the results of the commission of the offense being investigated.

(3) [X] Is contraband possessed or controlled in violation of the UCMJ and appropriate federal statutes.

Accordingly, Special Agent Latternee N. Montague, Jr, with the assistance of such person or persons as may be necessary, is directed to search forthwith the (person) (premises) described for the property specified, and if such property be found to seize and secure the same for use as evidence in any criminal prosecution hereafter initiated. This authority to search and seize is issued by virtue of:

[ ] My position as commander having jurisdiction over the (person) (premises) herein described.

[X] The delegation to me of the authority to authorize searches and seizures by the commander having jurisdiction over the (person) (premises) herein described.

No search conducted pursuant to the authority herein granted shall be initiated later than three days from the date hereof.

Dated 27 August, 1970, at [illegible]

TYPED NAME, GRADE, AND ORGANIZATION OF AUTHORIZING OFFICIAL

SIGNATURE

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS A. LEBRON, JR.,

Appellant,

- against -

THE U.S. SECRETARY OF THE AIR FORCE,

Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 11th *day of* August *19* 75 *at* 1 St. Andrews Pl., N.Y., N.Y.

deponent served the annexed Appendix *upon* Paul J. Curran

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this
day of *19*

Victor Ortega
VICTOR ORTEGA

ROBERT TAYLOR
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977